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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 21, 2000

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: CC Docket Nos. 96-98, 99-68; Comments Sought on Remand of the Commission's Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit

Dear Secretary Salas:

Enclosed please find an original and four (4) copies of the Comments of Global NAPs Inc. in the above-referenced proceeding.

Please contact the undersigned if you have any questions or if I can be of further assistance.

Very truly yours,

Chris Savage (RJB)

Christopher W. Savage

cc: Attached Service List

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Comment Sought On Remand Of The Commission's Reciprocal Compensation Declaratory Ruling By The U.S. Court Of Appeals For The D.C. Circuit	CC Docket Nos. 96-98, 99-68

COMMENTS OF GLOBAL NAPS, INC.

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July 21, 2000

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Summary

The D.C. Circuit's decision vacating the Commission's *Reciprocal Compensation Ruling* provides the Commission with an opportunity to take a fresh look at the statutory and economic considerations regarding the treatment of ISP-bound calls under Section 251(b)(5). The key inquiry mandated by the court is whether it makes sense, in light of the purposes of reciprocal compensation on the one hand, and access charges on the other, to classify ISP-bound calls as "local" calls subject to reciprocal compensation — which it clearly does. Reciprocal compensation for ISP-bound calls is essential to the continued availability of competitive alternatives for ISPs seeking to continue and expand their dial-up Internet access services.

The court made clear that ISP-bound calls may be classified as "local" for reciprocal compensation purposes even though they may also be properly viewed as jurisdictionally interstate under a traditional application of the end-to-end test. This highlights the fact that the proper treatment of ISP-bound calls for compensation purposes is a wholly distinct inquiry from their classification for jurisdictional purposes. ISP-bound calls may be, and frequently are, simultaneously interstate and local.

In this regard, in statutory terms, the relevant antinomy is not "local" calls versus "interstate" calls; it is "local" calls versus "toll" calls. A review of the statutory definitions of these terms ("telephone exchange service" and "telephone toll service") shows that this distinction is drawn primarily in terms of economics — whether there is a special, separate charge for the calls over and above local service charges — and not geography. This supports the conclusion that ISP-bound calls are properly viewed as "local" even if some form of communication continues beyond the ISP to distant web sites. In those cases the "communication" may be interstate, but the ***call*** is local.

Indeed, the term "call" is significant in this context. While the term is not strictly defined in the Act, its usage throughout Title II (including in Section 252(d)(2)) clearly shows that it refers to normal, circuit-switched telephony between two stations on the PSTN. Consequently (and, again, irrespective of any "communication" that occurs beyond the ISP), a ***call*** to an ISP terminates at the ISP which is, as the D.C. Circuit observed, "clearly the called party."

Much confusion on these issues has been engendered by the debate over whether and to what extent ISP-bound calls are properly classified as a form of "access." The confusion has been heightened by the fact that the Commission's long-standing ***regulatory*** definition of "access service" in 47 C.F.R. § 69.2 is essentially coterminous with services provided by local exchange carriers that are subject to the Commission's Title II jurisdiction, so to the extent that ISP-bound calls are properly viewed as jurisdictionally interstate, they probably fall within that broad definition of "access service" as well. On the other hand, the newly-enacted statutory definition of "exchange access" is in one sense much narrower than the old regulatory definition, in that it only applies to uses of telephone exchange service to originate or terminate toll calls. On the other hand, the new definition is also broader, in that it applies to uses of telephone exchange service in connection with either interstate or intrastate toll calls, whereas the old regulatory definition did not reach intrastate services at all.

Global NAPs believes that the Commission has been struggling to classify ISP-bound calls as a form of access in order to ensure that the Commission retains jurisdiction over these calls. Under the old regulatory definition, it might be true that if these calls are not access, that could only be because the Commission did not have jurisdiction over them. But the new statutory definition is so narrow that there is no conflict between concluding that ISP-bound calls are not "exchange access" even though the Commission retains jurisdiction over them under the end-to-end test. In other words, the Commission's efforts to squeeze ISP-bound calls into the statutory "exchange access" box are not only unavailing — those calls just don't fit — but also unnecessary to preserve the Commission's jurisdiction.

The conclusion that ISP-bound calls should be treated as local under Section 251 is confirmed by the discussion of "information access" in Section 251(g). That section preserves intact the arrangements for "information access" in existence as of the enactment of the 1996 Act, until affirmatively changed by the Commission. As a result of the long-standing ESP Exemption, the dominant form of "information access" in existence at that time was ISPs buying local exchange service out of local exchange tariffs in order to receive local calls from their subscribers. It follows that Section 251(g) requires this local treatment of ISP-bound calls to be continued, including for purposes of Section 251(b)(5), until and unless the Commission affirmatively establishes some different regime.

Finally, the Commission need not make detailed pronouncements about how to handle reciprocal compensation for ISP-bound calls beyond a clear declaration that such calls are indeed subject to Section 251(b)(5). Most of the controversy on this topic has arisen due to the ILECs' ability to make non-totally-frivolous claims that no compensation for such calls is due at all. Once it is clearly established that compensation is due, the normal process of negotiation and arbitration under Section 251 and 252 should produce reasonable outcomes in due time. The Commission should, however, expressly ban any non-voluntary arrangements that target ISP-bound calls as such for separate and unfavorable compensation treatment, or that penalize CLECs who serve ISPs and other customers who receive, rather than make, telephone calls. The entire purpose of reciprocal compensation is to ensure that competing for the business of customers who receive calls is economically viable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Comment Sought On Remand Of The Commission's Reciprocal Compensation Declaratory Ruling By The U.S. Court Of Appeals For The D.C. Circuit	CC Docket Nos. 96-98, 99-68

COMMENTS OF GLOBAL NAPS, INC.

Global NAPs, Inc. ("Global NAPs") respectfully submits these comments in response to the Public Notice in this matter.[1] The Public Notice was issued in response to the D.C. Circuit's decision in *Bell Atlantic v. FCC,* 206 F.3d 1 (D.C. Cir. 2000), which vacated and remanded the Commission's February 1999 *Reciprocal Compensation Ruling.*[2] As requested in the Public Notice, these comments focus on "the issues identified by the court in its decision," as well as certain claims that have been raised in *ex parte* filings since May 1999.

1. Introduction And Summary.

Global NAPs is a competitive local exchange carrier ("CLEC") that currently operates in states including New Hampshire, Massachusetts, Rhode Island, New York, Virginia, and Florida, and that plans to expand into other states as well. Global NAPs has been operational for only about three years, but has been successful thus far in entering local exchange markets by focusing on the unique telecommunications needs of Internet Service Providers ("ISPs").

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1 FCC 00-227, "Comment Sought On Remand Of The Commission's Reciprocal Compensation Declaratory Ruling By The U.S. Court Of Appeals For The D.C. Circuit," *Pleading Cycle Established,* CC Docket Nos. 96-98, 99-68 (released June 23, 2000).

2 Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96098 and (footnote continued)...

To remain in business, ISPs need local exchange service (that is, telephone service with numbers addressable on the public switched telephone network ("PSTN")); their local exchange service must be accessible as a local call from throughout a wide area; they need highly reliable, non-blocking incoming lines; they need adequately wired, powered and air conditioned space to locate their own modems and servers; they need good upstream connectivity to the Internet backbone; they need competitive and affordable rates for the services they use; and they need quicksilver maintenance responses in cases where there is some problem with the services they are buying. Global NAPs survives and prospers in the marketplace by meeting the needs of this demanding customer group.

Although high-bandwidth Internet access arrangements such as DSL and cable modems often capture more attention from analysts and the trade press, the fact remains that an overwhelming majority of Americans access the Internet by means of a dial-up connection to their chosen ISP. Indeed, with 45+ million American households on-line,[3] and an industry-standard ratio of 8 to 10 dial-up customers per dial-in line (to avoid busy signals), ISPs as a group subscribe to somewhere between 5,000,000 and 9,000,000 local exchange lines nationwide — more telephone lines than all but the largest cities, and many states.

Given the growth of ISP demand for local exchange lines — a consequence of the exploding demand for Internet access that is part and parcel of the nation's astonishing record of economic growth over the past decade — it should hardly be surprising that a number of entrepreneurial CLECs, including but by no means limited to Global NAPs, have concluded that serving ISPs is a solid market entry strategy. Moreover, while serving ISPs is a good business approach in its own right, Global NAPs also believes that developing a customer base of ISPs

(...continued)
Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, 14 FCC Rcd 3689 (1999) ("*Reciprocal Compensation Ruling*").

3 *See, e.g.,* Strategis Group, "U.S. Households With Internet Access to Nearly Double to 90 Million by 2004," (press release, February 8, 2000) ("The number of Internet households increased from 14.9 million in 1995 to 46.5 million today").

provides a springboard for offering a variety of telecommunications services, over time, to a variety of different customer groups.

A key factor in the growth of the Internet in the United States — including all the economic and other benefits of an increasingly "wired" economy — is this Commission's long-standing policy of requiring local exchange carriers to allow ISPs to purchase their connections to the PSTN on the same terms as any other business user. The Commission has consistently held that ISPs are ***users*** of telecommunications services, not telecommunications carriers, and that their use of the network differs in significant ways from the use of the network by interexchange carriers ("IXCs").[4] As a result of this policy, American consumers — unlike consumers in many other nations — can call their ISPs and connect to the Internet as a flat-rated local call. This is the purpose and effect of the Commission's longstanding "ESP Exemption" from access charges.

There is no need at this late date to rehearse the ILECs' abject failure to anticipate the explosion of demand for access to the Internet, and their efforts to convert that failure into a basis for instituting the so-called "modem tax" (since scrambling to reconfigure their networks to accommodate the surge in consumer demand for Internet access would have ***actually forced the ILECs to invest in response to market demand***). The Commission need only consult its own records to see what the ILECs themselves said about these issues.[5] What does bear emphasis, however, is that the ILECs remain wildly profitable, despite the surge in consumer demand for Internet access. One reason that this is so — despite the ILECs' dire predictions as the Internet explosion was beginning — is that most of the heavy lifting (in terms of investment and network configuration) has not been undertaken by the ILECs at all. It has been undertaken by CLECs such

[4] Indeed, the Commission's temporary lapse in adhering to this view — that is, its failure to treat ISPs as an end user group, distinct from IXCs, which are carriers — contributed materially to the D.C. Circuit's displeasure with the reasoning in the *Reciprocal Compensation Ruling*. *See Bell Atlantic v. FCC*, 206 F.3d at 6-8.

[5] *See, e.g.*, Comments by Pacific Telesis Group on the Notice of Inquiry, In the Matter of Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket No. 96-263 (filed March 27, 1997) ("*Pacific Telesis Internet NOI Comments*") at 27, 31-34; *BA/NYNEX Internet NOI Comments* at 4-7.

as Global NAPs. Putting the matter bluntly, Internet penetration is what it is in America today because of the efforts of CLECs, not ILECs.

Despite not doing the heavy lifting, the ILECs have profited handsomely from the surge in consumer demand for Internet access. As Internet usage increases, more and more consumers have found it reasonable to obtain a second telephone line for their modem usage. ILECs typically have long since placed the spare loop plant necessary to meet growth in demand for second lines. Consequently, as second line growth accelerates, the ILEC simply starts earning entirely new, incremental revenues on already-placed plant (including, *e.g.,* the increased subscriber line charge ("SLC") associated with second lines). And, because CLECs, not ILECs, have largely undertaken the investment in switching and related plant needed to actually connect the ISPs to the PSTN, the only "new" cost for the ILECs has been the need to augment inter-switch trunk groups to handle the increased volume of calling that their own customers are generating. And, in that regard, consistently falling prices for fiber transport — and the ability to augment the capacity of already-placed fiber by attaching more modern and efficient electronics to it — make the cost of interswitch fiber transport modest indeed.

In these circumstances, one would think that the ILECs would be delighted with the current situation. They are selling more second lines and making lots of money doing it. They have avoided the enormous costs (both economic and institutional) associated with reconfiguring their embedded networks, optimized for voice calling patterns, to accommodate the explosion of consumer interest in the Internet and the (derivative) ISP demand for local exchange lines. And the costs they do need to incur to handle the upsurge in traffic are quite modest in light of advances in fiber technology. They should be in hog heaven.

Of course, they're not. Conditioned by a century of monopoly control of the local exchange — they think that ***all*** the money in this market is ***theirs*** — and by nearly two decades of financial addiction to a dysfunctional access charge regime — under which they have collected outlandish fees for any traffic that touches their network, coming or going — they emit howls of outrage at the notion that when they collect money from their customers to deliver their customer's calls to ISPs, and then use CLEC investments and facilities to get that job done, ***they actually have to pay the CLECs for the work that the CLECs do.***

In order to avoid the outrage of paying CLECs, the ILECs have engaged in a multi-year, multi-front regulatory war. Since the economic logic of requiring them to pay is so simple and compelling, the ILECs' prime weapons have been economic stonewalling and legal obfuscation.

Stonewalling is simple — just don't pay the bills the CLECs send, and make the CLECs sue to get paid. Eventually some CLECs will fold entirely; some will settle for a few cents on the dollar; and any that hold out for full payment will only receive it after numerous and lengthy appeals. Even if a CLEC receives 100 cents on the dollar at the end of the day, stonewalling is still profitable if the interest penalty on the delayed payments is less than the ILECs' return on capital remaining in the business. When CLEC business failures and settlements are taken into account, stonewalling is a financial no-brainer.[6]

As a matter of business realpolitick, it is hard to argue with this business strategy. For present purposes, however, what matters is why it works, which is that the ILECs are monopsonists. That is, ILECs overwhelmingly serve the residence and small business customers that use dial-up access to the Internet. As a result, in any given area the ILEC will be the ***monopoly buyer*** of the CLEC's services in delivering end user calls to ISPs.[7] In economic terms, therefore, ILEC refusal to pay a reasonable rate for CLEC call termination services is monopoly abuse, pure and simple.

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[6] It is the ILECs' consistent and uniform implementation of this strategy that has led to the proliferation of state-level decisions and associated appeals on the topic of compensation for ISP-bound calls. With a fortitude worthy of Winston Churchill, ILECs fight against compensation in negotiations; and when they cannot win in negotiations, they fight before arbitrators; and when they lose before arbitrators, they fight before state commissions; and when they lose before state commissions they fight in federal district court; and when they lose in federal district court they fight in courts of appeals. One can only stand in awe of their sheer tenacity in trying to avoid paying for using CLEC services. From this perspective, recent ILEC-inspired legislative efforts to ban compensation reflect both a logical expansion of their "total war" approach, as well as a recognition that — when all the dust settles — an overwhelming majority of states and reviewing courts have handed the ILECs their heads on a platter.

[7] A monopoly seller exploits its customers by charging them too much for too little product. A monopoly buyer exploits its suppliers by paying them too little (or, if possible — as in this case — not paying them at all) for the services it obtains.

The ILECs' position before this Commission and in other policymaking forums (state commissions, Congress, etc.) is nothing more or less than an effort to get government support for this abuse. The only sensible answer is to reject these importunings and affirm the obvious — when an ILEC uses CLEC facilities to complete calls made by (and charged to) the ILEC's own end users, the ILEC has to pay the CLEC for that use.

To the extent that this conclusion is not totally clear to someone reading these comments, that is likely a testament to the effectiveness of the ILECs' three-year campaign of obfuscation. Doubtless, some of the legal and regulatory questions relating to ISP-bound calls are not utterly pellucid. In fact, though, the relevant provisions of the Act point fairly clearly to the correct answer.

Start with Section 251(b)(5). Nothing in that section limits mandatory reciprocal compensation arrangements between LECs to "local" traffic. The statute requires LECs to enter into reciprocal compensation arrangements for the "transport and termination of ***telecommunications***." That said, Section 251(g) continues access charge rules and requirements until the Commission changes them, and Section 251(i) makes clear that nothing in Section 251 affects the Commission's authority under Section 201 (under which access charges were established). So it certainly seems logical to conclude that where a LEC collects "Section 201" access charges for delivering a call to a customer (such as an IXC), the LEC should not ***also*** collect "Section 251" reciprocal compensation. One or the other applies, but not both. Presumably for these reasons, the Commission's regulation implementing Section 251(b)(5) limits the application of that section to "local" calls.

Seizing on this limitation, the ILECs have asserted that ISP-bound traffic is interstate, and that interstate traffic cannot be "local;" they have asserted that ISP-bound traffic meets the Commission's regulatory definition of "access service" (*see* 47 C.F.R. § 69.2), and that "access service" traffic cannot be "local;" and they have asserted that ISP-bound traffic actually meets the ***statutory*** definition of "exchange access," and that "exchange access" traffic cannot be "local."

These assertions are wrong. Under an "end-to-end" test, some ISP-bound traffic is interstate, and some is interstate, but either way, typical ISP-bound calls are "local" under any definition of the term grounded in the Act (that is, the definition of "telephone exchange service").

Many ISP-bound calls probably meet the Commission's regulatory definition of "access service," but that definition is so broad that it cannot reasonably be read to exclude traffic that may also be treated as "local" for other purposes, including intercarrier compensation. Indeed, for fifteen years the ESP Exemption has both assumed that ISP-bound traffic is a species of "access service" and directly and purposely ***required*** that this traffic be treated as local. ISP-bound traffic almost certainly does ***not*** meet the (much narrower) statutory definition of "exchange access;" but if it does, that is not a bar to the traffic ***also*** meeting the definition of "telephone exchange service." In any case, that question has nothing to do with whether ISP-bound calls should be classified as subject to the reciprocal compensation regime of Section 251(b)(5).

This, of course, is the gravamen of the D.C. Circuit's order vacating the Commission's first attempt to grapple with this topic. In the *Reciprocal Compensation Ruling,* the Commission, with due respect, simply got a few of the critical questions wrong. The Commission assumed (based on earlier precedent) that ISP-bound calls are a form of "access," without examining the fact that the Telecommunications Act of 1996 had for the first time given a ***statutory*** definition of that term. And then the Commission utterly confused two very distinct statutory inquiries: (1) whether a communication is "interstate" (properly determined by considering 47 U.S.C. § 153(22) and 47 U.S.C. § 153(52)); and (2) whether a telephone call is "local" (properly determined by considering 47 U.S.C. § 153(47) and 47 U.S.C. § 153(48)). To make matters worse, the *Reciprocal Compensation Ruling* was finalized without consideration of the true scope of the Commission's authority in this area, established by the Supreme Court in *AT&T Corp. v. Iowa Utilities Board.*

Based on this confusion, the Commission concluded (erroneously) that to ensure its own ability to set the rules for intercarrier compensation, it had to declare ISP-bound calls to be interstate, and then concluded (also erroneously) that if ISP-bound calls were interstate, they could not also be "local" for compensation purposes. Then on appeal, the Commission and CLEC intervenors got tangled up over whether ISP-bound calls were ***statutory*** "exchange access" or not; this, in turn, appears to have led the Commission to issue its poorly reasoned and unsupported conclusion that ISPs use "telephone toll service" for their upstream connections to the Internet, and that an end user calling an ISP "accesses" that (actually non-existent) "telephone toll service," leading to the conclusion that the call to the ISP is really "exchange access" after all.[8]

It cannot be a pleasant experience to have a painstakingly negotiated and delicately crafted pronouncement like the *Reciprocal Compensation Ruling* vacated. Even so, the Commission should nonetheless be grateful from at least one perspective. The *Reciprocal Compensation Ruling* was crafted as it was, at least in part, due to the severe restrictions on the Commission's rulemaking authority imposed by the 8th Circuit in that court's initial review of the August 1996 *Local Competition Order*. No matter what the Commission may have privately thought about its own authority, the law of the land, before the Supreme Court acted, was that the Commission basically lacked jurisdiction to direct how states should implement Section 251(b)(5), either in general or in relation to ISP-bound calls.

To be able to set the rules in this area, the Commission thought it had to ***take the issue away from the states***, which it did (in the long run) by declaring ISP-bound calls to be both interstate and non-local. At the same time, to avoid lending aid and comfort to the ILECs' anticompetitive efforts to deny compensation, the Commission thought it had to ***affirm the authority of the states to resolve the question***, which it did (in the short run) by focusing on states' authority to interpret interconnection agreements and to establish terms in arbitration that go beyond minimum federal requirements (a power embodied in 47 U.S.C. §§ 251(d)(3) and 252(e)(3)). The *Reciprocal Compensation Ruling* did a good job on both counts. But at bottom the conflict between the two simultaneous objectives was too much for almost any logic to bear. The D.C. Circuit noted as much when it characterized the result of the *Reciprocal Compensation Order* as "intuitively backwards." Indeed, in retrospect, and now that the issue has to be reexamined, even the Commission might admit that it does seem a little odd to conclude that states have the authority

8 *See Bell Atlantic v. FCC,* 206 F.3d at 8-9.

and/or responsibility to determine intercarrier compensation arrangements for interstate traffic, not covered by Section 251(b)(5), and as to which there was no applicable federal rule.[9]

The reason that the Commission should be grateful to the D.C. Circuit is that, by vacating the *Reciprocal Compensation Order,* the court has given the Commission the opportunity to deal with this issue directly and forthrightly, ***now that the Supreme Court has established the Commission's authority to set the rules for how Section 251(b)(5) works.*** *AT&T Corp. v. Iowa Utilities Board* may not have fully drained the jurisdictional swamp, but it surely makes it unnecessary for the Commission to venture into it. If and to the extent that ISP-bound calls are jurisdictionally interstate, the Commission can direct that they be compensated under Section 251(b)(5) because it has plenary authority ***both*** over interstate traffic ***and*** over how Section 251(b)(5) works. And if and to the extent that ISP-bound calls are jurisdictionally intrastate, the Commission can direct that they be compensated under Section 251(b)(5) because the Commission has plenary authority over how Section 251(b)(5) works, even with regard to intrastate traffic.[10] The brooding omnipresence of jurisdictional ambiguity that infused the *Reciprocal Compensation*

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9 Global NAPs is not saying that the Commission actually legally erred in the result reached by the *Reciprocal Compensation Order,* depending on how that order is interpreted. (Indeed, Global NAPs intervened in the appeal on the side of the Commission.) Sections 251 and 252 plainly do, to some extent, give states responsibility with respect to jurisdictionally interstate matters not within their purview prior to the Telecommunications Act of 1996. And Sections 251(d)(3) and 252(e)(3) in particular plainly do, to some extent, empower states to impose interconnection obligations beyond those mandated by federal rule. Of course, more radical interpretations of the *Reciprocal Compensation Ruling* — including the peculiar notion that that order could somehow divest the Commission of its own statutory authority over interstate traffic, or supercede clear statutory provisions such as Sections 201, 202, 203, and 10 of the Act — are, and always have been, insupportable. In this regard, Global NAPs notes that in the D.C. Circuit proceedings, the Commission did not seek to rely on any claim that it had actually conveyed any power to the states or disclaimed any of its own statutory responsibilities. This was evidently a wise choice, in that the D.C. Circuit was clearly suspicious of any such extra-statutory grant of new interstate authority to state commissions. *See Bell Atlantic v. FCC,* 206 F.3d at 9 (last paragraph of the decision).

10 In this regard, the D.C. Circuit noted that under *AT&T Corp. v. Iowa Utilities Board,* the "intuitively backwards" result was not the Commission directing states how to apply Section 251(b)(5) even to intrastate traffic, since that task was within the Commission's authority; it was setting up a regime in which states had the first and possibly final regulatory say over the treatment of (by hypothesis) ***interstate*** traffic which was (by hypothesis) ***not*** subject to Section 251(b)(5).

Ruling has been banished. This time around, the Commission may simply declare what the right answer is, and have its answer stick.

Which brings us, at last, to what the right answer ***is.*** This is actually not a very hard question. ISP-bound calls are, technically and economically, "local" calls. The end users making the calls are charged for them in accordance with local service tariffs. They are routed through the PSTN like local calls. The ISPs receiving the calls receive them on lines purchased out of local service tariffs. They should therefore be subject to compensation just like any other local calls, subject, as always, to the parties' ability (under 47 U.S.C. § 252(a)(1)) to negotiate mutually agreeable arrangements that differ from the basic federal minimum requirements.

Global NAPs expects that the Commission will hear a lot about how ISP-bound calls differ in various respects from traditional local calls. The two main differences of which Global NAPs is aware are (a) the calls tend to be somewhat longer, on average, than voice calls, and (b) often CLECs provide service to a large number of collocated ISPs, as opposed to a geographically dispersed group of customers. Neither of these situations warrants specific Commission action. To the contrary, when the Commission declares that ISP-bound calls are indeed local calls subject to Section 251(b)(5), ILECs will finally realize that they really do have to negotiate in good faith on how to compensate CLECs for such calls. The stonewalling, in other words, should end. Global NAPs is confident that the industry (in the context of litigation over existing contracts and negotiation of new ones) will reasonably quickly develop appropriate solutions to these and any other legitimate cost and technical factors that could warrant something other than a reciprocal compensation regime based on a simple per-minute charge.

What the Commission must ***not*** do is permit states to impose a separate regime for ISP-bound traffic, as opposed to other local traffic. If there are features about ISP-bound traffic that have economic consequences (*e.g.*, call duration), any reasonable compensation regime would apply across the board to ***all*** traffic that shares those features. Allowing states to establish separate-but-unequal compensation arrangements for ISP-bound traffic simply because it is ISP-bound is nothing more or less than facilitating ILEC efforts to exercise their monopsony power over CLECs. Similarly, there is no economic basis for the ILECs' pet notion that ISP-bound calls should be subject to lower (or no) compensation simply because ISPs receive calls but do not normally make them, *i.e.,* that ISP-bound traffic is mainly one-way. The entire point of a reciprocal compensation regime is to recognize that traffic will be out of balance, and that the receiving carrier is entitled to payment for what it does ***in an out-of-balance condition.*** If traffic is balanced, then reciprocal compensation doesn't matter, since each LEC's payment obligations will (by definition) balance out, whether the per-minute rate is $0.001 or $1.00 per minute.

The remainder of these comments is organized as follows. Section 2 reviews the economic and competitive basis for treating ISP-bound calls as local calls for purposes of intercarrier compensation, and concludes that the purposes of Section 251(b)(5) can only be served by subjecting those calls to reciprocal compensation. Section 3 discusses the key issues of statutory interpretation raised by the D.C. Circuit's reasoning in *Bell Atlantic v. FCC*, and concludes that a variety of relevant statutory provisions all support the conclusion that ISP-bound calls may and should be treated as local calls for reciprocal compensation purposes.

2. Economic And Competitive Considerations Compel The Conclusion That ISP-Bound Calls Should Be Treated As "Local" For Purposes Of Intercarrier Compensation.

One of the problems the D.C. Circuit found in the *Reciprocal Compensation Ruling* was the Commission's failure to relate its classification of ISP-bound calls as non-local to the purposes and functions of the two main alternative compensation regimes (reciprocal compensation for "local" calls, access charges for "long distance" calls). *See Bell Atlantic v. FCC,* 206 F.3d at 7. As the court put it (emphasis added), "[h]owever sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications [the call to the ISP, and the ISP's upstream connection to the Internet] as continuous works ***for purposes of reciprocal compensation***." In fact, treating ISP-bound calls as a continuous communication between an end user and a distant web site does ***not*** "work" for purposes of reciprocal compensation. To see why requires a brief discussion of what those purposes are.

The basic purpose of reciprocal compensation is to facilitate competition between LECs in local markets. Congress implicitly recognized that the overwhelmingly dominant pricing arrangement for local telecommunications markets is that calls are sent paid, *i.e.,* the end user making a call pays the LEC to which the end user is connected a fee intended to cover getting the call all the way to the dialed number. In a sent-paid regime with only one monopoly LEC, the analysis is trivial — that LEC collects all the money from the end user making the call, and does all the work getting the call to its destination. To make local competition work, however, requires reciprocal compensation, so that the LEC that actually completes a call handed off from another LEC can get paid for what it does — and thereby actually enter the market.[11]

That is, in a sent-paid regime, each LEC collects from its own end users the costs of terminating the calls that those end users make. If one end user calls another on the same LEC's network, then the end user revenue is received by the same LEC that incurs the costs of terminating the call. But if the called party is on a different LEC's network, that LEC has no relationship with the calling party. The only way that the LEC serving the called party can be compensated for the costs of terminating calls originating on another LEC's network is by receiving terminating compensation payments from the other LEC. This is because local business line rates are not set to recover the costs of incoming usage.[12] Instead, the costs of local usage are generally recovered from the cost causer (*i.e.,* the person making the call), either as part of a flat-rated calling plan, or under a measured/message rated service plan.

In economic terms, therefore, when an ILEC serves an ISP, the ISP does not pay a rate designed to cover incoming switching. Instead, payments from end users provide, on average, the revenues needed to cover the costs of getting calls all the way to the called party — including

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11 Note that in technical terms, calls to ISPs are "local" in every relevant respect. They are dialed as local, the SS7 signaling associated with them is local, and they are routed through LEC networks as local. The main difference that ILECs claim to exist — and which no one seriously disputes — is that, on average, completed calls to ISPs may have longer duration than the average traditional voice call. But this fact — which suggests that a CLEC serving ISPs actually has to do ***more,*** not less work than for "normal" calls — hardly supports a claim that ISP-bound calls should not be subject to compensation.

12 Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) ("*Access Charge Reform Order*") at ¶¶ 341-45, *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

situations where the called party is the ISP.[13] In these circumstances, if there is to be competition between ILECs and CLECs for the business of ISPs, then — just as the ILEC covers the costs of switching calls to the ISPs based on its charges on the customers making the calls — so too must the CLEC be able to do so. Otherwise, the CLEC would be forced to charge ISPs an uncompetitively high rate for the ISPs' connections to the PSTN. The only way to avoid this problem is to establish intercarrier compensation, running from the LEC whose customers are making the calls and causing the costs to be incurred, to the LEC whose ISP customers receive the calls (usually the CLEC). Viable competition among carriers for the business of ISPs — and, therefore, the affordability of dial-up Internet— depends on reaching this economically correct answer.

The D.C. Circuit fully grasped this situation. As the court stated, "[w]hen LECs collaborate to complete a call, [Section 251(b)(5)] ensures compensation for both the originating LEC, which receives payment from the end-user, and for the recipient's LEC." *Bell Atlantic v. FCC,* 206 F.3d at 2. Moreover, it fully understood that this arrangement was distinct from the access charge system applicable to true long distance calls. "Unlike reciprocal compensation, these access charges are not paid by the originating LEC. Instead, the long distance carrier itself pays both the LEC that originates the call and links the caller to the long distance network, and the LEC that terminates the call." *Id.* at 4. And, it fully and succinctly grasped that this distinction was the crucial one: "The issue at the heart of this case is whether a call to an ISP is local or long distance." *Id.* at 5.[14]

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13 ILECs often argue that end users are really calling "the Internet" or a "distant web site," usually as part of an argument that ISP-bound calls are not really "local." The federal Court of Appeals for the District of Columbia Circuit decisively rejected that contention in *Bell Atlantic v. FCC, supra,* in which the court — addressing precisely this concern — found that when a consumer dials up his or her ISP, the ISP is "clearly the called party."

14 Note that the court did ***not*** view the key issue to be whether the calls were "interstate" or not. As described in Section 3 below, the court was quite content with the Commission's application of the end-to-end test for purposes of determining whether the Commission, as opposed to the states, has ultimate regulatory jurisdiction over these calls. But the ***economic*** question of what inter-carrier compensation regime applies is determined by whether the ISP-bound calls are best viewed as "local or long-distance" in light of the pro-competitive purpose of Section 251(b)(5).

It makes no sense at all to treat ISP-bound calls as economically equivalent to long distance calls for purposes of reciprocal compensation. To the contrary, the Commission has taken great pains over the years to ensure, by means of the ESP Exemption and related rulings, that ISP-bound calls are ***not*** economically equivalent to long distance calls, and ***are*** economically equivalent to local calls.

As a result, if an ILEC were exempt from the obligation to pay terminating compensation to CLECs, that ILEC would receive a totally unjustified windfall. This is because, as CLECs obtain customers, those customers drop off of the ILEC's network (or, in the case of new customers, never attach to it in the first place). As a result, the ILEC experiences a reduction in its costs (or an avoidance of new costs) directly proportional to the amount of terminating traffic the lost customers receive. In addition to avoiding the variable costs of terminating calls, the ILEC's switches will experience less usage, so switch growth and replacement can be deferred. Moreover, once a CLEC obtains an initial minimum level of customers, the ILEC can establish efficient trunking arrangements between its network and the CLEC's network. This will free up capacity in the ILEC's own inter-switch network, leading to deferral of the need to upgrade these inter-switch links.

The purpose of terminating compensation is to recognize that the functions that the ILEC no longer performs —reflected in the ILEC cost savings — are performed by the CLEC. Without terminating compensation, the ILEC would save the costs of terminating calls to the CLEC's customers, but would still collect revenues from its own end users. These are the same revenues that — prior to the arrival of the CLEC — the ILEC viewed as sufficient to cover its call termination costs. Yet the CLEC would have no source of revenues to cover the costs of terminating calls to its end users, other than the end users themselves. This would force the CLEC to increase its charges to its end users, because these end user charges would have to cover the costs of both call origination and call termination as well.

For these reasons, the reciprocal compensation obligation contained in Sections 251(b)(5) and 252(d)(2) of the Act is an essential part of Congress's effort to open up the local exchange market to meaningful competition.[15] If a CLEC was not entitled to compensation for calls the ILEC's end users make to the CLEC's end users, the CLEC would be forced to charge higher prices and would be unable to penetrate the market effectively, or, perhaps, at all.

This basic economic logic applies not only to the local exchange market in general, but to any particular class of customers within that market. If CLECs were not entitled to terminating compensation for calls to taxicab dispatch companies, CLECs would be unable to serve such companies economically. If CLECs were not entitled to terminating compensation for calls to government agencies, they would not be able to serve such agencies economically.[16] Consequently, if a CLEC is not entitled to receive terminating compensation for calls to ISPs, then the CLEC will not be able to serve ISPs economically. Once the ISP has disconnected its dial-up lines from the ILEC's end office switch, the ILEC would be relieved of many of the costs it previously incurred in terminating calls to the ISP. Instead, the CLEC would incur those costs as it switches calls from the ILEC's end users to the ISP's dial-in lines. The ILEC would continue to receive the same revenues from its end users as before. But the CLEC would receive no compensation for completing calls to the ISP. The only way to recover those costs, therefore, would be to increase its charges, either to its end users generally or to ISPs in particular. In either case, the CLEC's ability to compete would be severely harmed.[17]

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[15] The basic purpose of the Telecommunications Act of 1996 was to establish a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans ***by opening all telecommunications markets to competition.***" Joint Manager's Statement, S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 1 (1996) (emphasis added).

[16] Indeed, without terminating compensation, the only types of customers that CLECs could profitably serve would be customers who use their local exchange service exclusively for outgoing calls. Only for these (hypothetical) customers would the CLEC experience no uncompensated call termination costs.

[17] In other words, in economic terms, if any group of customers that ***receives*** "local" calls (defined as calls that end users dial as local and for which the customers do not pay incoming access or similar charges) is carved out of the general reciprocal compensation regime, it will be uneconomic to compete for the business of those customers. In this regard, the D.C. Circuit properly concluded that ISPs are essentially similar to "many businesses, such as pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies, which use a variety of communication

(footnote continued)...

The costs of terminating calls to ISPs —as with taxicab dispatch companies, pizza delivery services, and other customers who use their local exchange services exclusively or predominantly to receive calls —are substantial. As a result, the denial of terminating compensation for calls to ISPs would give CLECs a strong disincentive to compete for the business of such customers in the first place. Without terminating compensation, therefore, the only firms that will be able to provide local exchange service to ISPs will be the ILECs. In other words, the effect of accepting the ILECs' view that calls from their end users to the Internet are ***not*** subject to terminating compensation would be to allow the ILECs to re-monopolize the market for connections between the Internet and the public switched network.[18]

There is no conceivable reason to deprive ISPs of competitive choices in obtaining circuit-switched connections to the PSTN. To the contrary, Congress has stated that the basic purpose of the Telecommunications Act of 1996 is to establish a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans ***by opening all telecommunications markets to competition.***"[19] It would make no sense to interpret Sections 251(b)(5) and 252(d)(2) of the Act to ***eliminate*** competition for the business of ISPs. Yet this is the inevitable result of accepting the ILECs' argument.

(...continued)
services to provide their goods or services to their customers." *Bell Atlantic v. FCC,* 206 F.3d at 7 (citations and internal quotations omitted).

[18] The ILECs have long claimed that they incur substantial costs in terminating calls to ISPs ***on their own networks***. *See, e.g., BA/NYNEX Internet NOI Comments* at 4, 6. This only emphasizes the need for terminating compensation as between ILECs and CLECs for calls to ISPs. If the costs of serving ISPs are so substantial, then the cost savings achieved by the ILECs, and the new costs incurred by the CLECs when the ISP switches carriers, are equally substantial. Of course, the Commission was not persuaded by claims that ILECs experience substantial ***uncompensated*** costs from serving ISPs, when all relevant revenues (*e.g.,* revenues from end users' purchases of second lines used to reach the Internet) are taken into account. *See Access Charge Order* at ¶ 347. The Commission's skepticism regarding ILEC claims of "uncompensated" costs indicates that the ILECs will not be unfairly disadvantaged by paying terminating compensation for the calls their end users make to the Internet.

[19] Joint Manager's Statement, S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 1 (1996) (emphasis added).

Indeed, such a result would be particularly inappropriate in light of Congress's specific decision that it "is the policy of the United States ... to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). Interpreting Section 251(b)(5) to deprive ISPs of all meaningful competitive choices for their links to the public switched network would directly frustrate that policy.

The anticompetitive impact of the ILECs' proposed treatment of calls to ISPs is compounded by the fact that many major ILECs are active participants in the business of providing dial-up access to the Internet. It would be quite bizarre to rule that existing ISPs must be forced to obtain their essential links to the public network from large, aggressive, well-financed competitors in the Internet access business when any number of competing LECs are available to serve them. Yet that would be the result of accepting the ILECs' claims that they do not need to pay terminating compensation for calls to ISPs served by CLECs.

Adopting a regulatory regime that would, in effect, force ISPs to obtain dial-up connections to the public switched network from ILECs would be particularly ironic in light of the fact that there will likely be network efficiency gains from transferring ISP dial-in lines from ILECs to CLECs. According to the ILECs, part of the reason they experience such high costs in serving ISPs is that they have not engineered their switches with the characteristics of ISP traffic in mind.[20] CLECs, whose networks are not as mature as those of the ILECs, have engineered their networks from the outset with ISP usage patterns in mind. ILECs, on the other hand, have understandably been reluctant to retrofit their networks to accommodate burgeoning ISPs needs.[21] Removing ISP lines from the ILECs' mis-engineered networks would give the ILECs a chance to consider how to configure their networks to meet society's ever-growing appetite for digital communications. If

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[20] *See, e.g., Pacific Telesis Internet NOI Comments* at 27 ("Heavy and unpredictable usage patterns of Internet traffic cause network congestion on the public switched network ***because local switching offices were not engineered for this type of traffic. They were engineered to accommodate the predictable usage patterns of voice traffic.***"); *BA/NYNEX Internet NOI Comments* at 7 ("Little of this unplanned investment would likely have been required if Internet usage had not ***substantially altered traditional traffic patterns.***").

[21] *See Pacific Telesis Internet NOI Comments* at 31, 34 (noting costs to try to retrofit network to accommodate Internet usage); *BA/NYNEX Internet NOI Comments* at 4, 6 (same).

they can find a way to do so more efficiently than the CLECs, then they will win back ISPs as customers. If they cannot do so, then they will not, and should not, win back the ISPs.

In sum, the purpose of reciprocal compensation is to enable CLECs to compete with ILECs in markets where the traffic is economically "local," *i.e.,* not subject to the access charge regime applicable to true long distance calls. That purpose — enabling and facilitating competition — is served by including ISP-bound calls within the class of calls to which Section 251(b)(5) applies, and, conversely, is frustrated if ISP-bound calls are excluded from the Section 251(b)(5) compensation obligation. It follows that — just as the D.C. Circuit has suggested — no matter how useful the "end-to-end" analysis may be for purposes of determining jurisdiction, that analysis simply does not "work" — at least not in any practical or pro-competitive sense — "for purposes of reciprocal compensation."

3. ISP-Bound Calls Should Be Classified As Subject To Section 251(b)(5) Irrespective Of Whether The Traffic Is Interstate, And Irrespective Of Whether It is "Access."

As noted above, once the Commission had limited reciprocal compensation to "local" calls, the ILECs began a relentless campaign to explain why ISP-bound calls — the main category of calls for which they were actually called upon to ***pay*** compensation — were not really "local" at all. The result has been enormous confusion.

The ILECs have pursued their strategy in three different ways. First, they claim that ISP-bound calls are interstate, and that interstate calls cannot also be "local." Second (often in service of the first claim), they claim that ISP-bound calls are a form of "access service" (in the regulatory sense) and that "access" traffic cannot be "local." Finally, they claim that ISP-bound calls are a form of "exchange access" (in the statutory sense) and that "exchange access" traffic cannot be "local." All of these claims are wrong.

Crucial to the ILECs' program of obfuscation is a determined effort to avoid looking at what the Communications Act — including provisions added by the Telecommunications Act of 1996 as well as older provisions — actually says about these questions. As the Commission recognized in the Public Notice (at 2, text at nn. 13-15), one of the salutary features of the D.C. Circuit's order is to focus the parties' attention on key provisions in the Act bearing on these questions.

There are a number of such provisions. These include, principally, the provisions in various subsections of Section 3 of the Act defining "telephone exchange service," "telephone toll service," "exchange access," "telecommunications," "telecommunications service," "wire communication," and "interstate communication," as well as Section 252(d)(2), which uses the undefined but highly relevant term "call" with respect to reciprocal compensation. Sections 251(g) and (i) are also relevant. While the statutory analysis can become somewhat complex, the point of the analysis is straightforward: what do these provisions tell us about whether ISP-bound calls should be viewed as "local" calls subject to compensation under Section 251(b)(5)?

a. The Jurisdictional Question.

In the proceedings leading up to the *Reciprocal Compensation Ruling,* the dispute that seemed to dominate the discussion was whether ISP-bound calls were jurisdictionally interstate or not. The ILECs assumed that ***if*** these calls were interstate, they could not also be local, and so argued vigorously that they were, indeed, interstate. Many CLECs apparently agreed, and so argued with equal vigor that the calls were, instead, intrastate. The Commission, apparently, accepted the proposed dichotomy and sided with the ILECs, concluding that ISP-bound calls were at least "largely" interstate and that, as such, they could not be "local" as well. *See Reciprocal Compensation Ruling* at n.87.

The D.C. Circuit did not accept the postulated dichotomy. Its entire order proceeds from the assumption that there is nothing wrong with applying the "end-to-end" analysis to the question of jurisdiction over ISP-bound calls — thereby implicitly accepting the Commission's tentative view that these calls are, or at least may be, interstate. At the same time, though, the court based its entire analysis vacating the *Reciprocal Compensation Ruling* on the view that ***even if*** the end-to-end analysis applied for purposes of determining jurisdiction, it did not necessarily apply for purposes of determining the application of Section 251(b)(5).

Putting the matter starkly, it is clear that as far as the D.C. Circuit is concerned, ISP-bound calls may plainly be ***both*** "interstate" for jurisdictional purposes ***and*** "local" for purposes of Section 251(b)(5). While this seems contradictory, in fact it is not.

As the court understood, the key question to determine the application of Section 251(b)(5) is economic: in light of the economics of ISP-bound calls, does application of reciprocal compensation make sense, or would it make more sense to exempt these calls from reciprocal compensation, judged in each case by the pro-competitive purposes of the statute? This is a completely different question from whether an ISP-bound call meets the "end-to-end" test for interstate jurisdiction, embodied in and derived from 47 U.S.C. § 153(22) (defining "interstate communication") and 47 U.S.C. § 153(52) (defining "wire communication").

In the normal case, if a communication is not "interstate" as defined in 47 U.S.C. § 153(22) of the Act, then the Commission has nothing more to do with it; indeed, in light of the 8th Circuit's ruling in the *Iowa Utilities Board* case, the Commission clearly thought that this normal rule applied to Section 251(b)(5) as well. But the Supreme Court's reversal of the 8th Circuit shows that the normal rule does ***not*** apply here. As the D.C. Circuit recognized, the Supreme Court has held that "under the 1996 At the Commission has jurisdiction to implement such provisions as § 251, even if they are within the traditional domain of the states." *Bell Atlantic v. FCC,* 206 F.3d at 6.

Consequently, it does not matter whether ISP-bound calls are interstate or not. What matters is whether it makes economic sense to treat them as local for purposes of Section 251(b)(5). If it does then that is what the Commission should do. Deciding to treat ISP-bound calls as local for this purpose, however, does not remotely require that the Commission somehow cede jurisdiction over them to the states.[22] The jurisdictional question is simply not relevant to the

22 There is pre-1996-Act precedent for the Commission retaining jurisdiction over matters that might otherwise appear to be intrastate in nature. Specifically, in connection with the treatment of enhanced services, the Commission has held that allowing jurisdictionally interstate services to be provided under the terms of state-level tariffs ***does not*** constitute a surrender of jurisdiction. *See, e.g.,* In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, *Memorandum Opinion and Order*, 7 FCC Rcd 5 (1992) ("*Voice Mail Order*") at ¶ 12 ("The Commission also has made it clear that it has not ceded jurisdiction over call forwarding when

(footnote continued)...

reciprocal compensation question. Again, what matters is what makes economic sense.[23] Bringing ISP-bound calls under the rubric of Section 251(b)(5) does. Failing to do so does not.

b. The "Local" Versus "Toll" Question.

The Commission defined "local" calls (other than CMRS calls) as those that originate and terminate within a state-defined local service area. *See* 47 C.F.R. § 51.701(b)(1). On appeal the D.C. Circuit expressed concern that the Commission, in determining how to apply this definition to ISP-bound calls, apparently paid inadequate attention to provisions in the Act — notably, the definition of "telephone exchange service" in 47 U.S.C. § 153(47) — that might bear on the

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used in interstate communications even if that service is locally tariffed."), *citing* In the Matter of Filing and Review of Open Network Architecture Plans, *Memorandum Opinion and Order*, 4 FCC Rcd 1 (1988) at ¶ 277 & n.628 ("[W]e theoretically could require dual federal/state tariffing or possibly even exclusive federal tariffing ... for such a service.")

[23] Global NAPs will not here rehearse in detail the numerous other contexts in which the Commission has held that ISP-bound calls should be treated as local (such as access charges, universal service obligations, and interconnection rights under Section 251); the Commission itself is quite familiar with them. *See Reciprocal Compensation Ruling* at ¶ 9 (noting that the logical implication of the Commission's treatment of ISP-bound calls in other contexts is that they be treated as local for compensation purposes as well). Global NAPs will note, however, that the D.C. Circuit appeared quite concerned that the Commission had disregarded or distinguished these precedents in reaching its original conclusion that ISP-bound calls were not covered by Section 251(b)(5). *See Bell Atlantic v. FCC*, 206 F.3d at 6-8.

Global NAPs also notes that the Commission was perfectly (and appropriately) willing to require "local" treatment of a large class of plainly interstate traffic because it made economic sense to do so. One of the issues to be resolved in August 1996 was intercarrier compensation between LECs and CMRS providers. The Commission not only concluded that CMRS providers have interconnection rights as against LECs, it specifically required that Section 251(b)(5) apply to any LEC-CMRS traffic that originates and terminates within the same MTA. *See* 47 C.F.R. § 51.701(b)(2). Virtually every MTA crosses state boundaries, so at a stroke the Commission deemed potentially vast amounts of plainly interstate traffic to also be "local" for reciprocal compensation purposes. An interstate intra-MTA call is circuit-switched end-to-end and plainly consists of a single, unified telecommunication. *Cf. Bell Atlantic v. FCC*, 206 F.3d at 6-7 (discussing long-distance-type situations where the Commission had applied the end-to-end analysis and contrasting those with ISP-bound calls). Yet that did not prevent the Commission from declaring that traffic to be subject to Section 251(b)(5). Similarly, certain plainly interstate traffic (*e.g.*, a call from Washington, D.C. to Alexandria, Virginia, or from Bethesda, Maryland to McLean, Virginia) is equally plainly "local" for compensation purposes. *See* 47 U.S.C. § 221(b). These examples prove that there is no ***statutory*** bar to treating interstate traffic as "local" for compensation purposes.

question of which calls are "local" and which are not. As the D.C. Circuit put it, "[t]he issue at the heart of this case is whether a call to an ISP is local or long distance," 206 F.3d at 5, a not-too-veiled reference to the distinction between "telephone exchange service" embodied in 47 U.S.C. § 153(47) and "telephone toll service" embodied in 47 U.S.C. § 153(48).

The Act itself does not define "local" service. Instead, the closest statutory term is "telephone exchange service."[24] 47 U.S.C. § 153(47) defines "telephone exchange service" as:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Two things are immediately apparent from this definition. First, nothing about it remotely suggests that it is limited to jurisdictionally intrastate communications. The statutory "opposite" of a local call (*i.e.*, an instance of "telephone exchange service") is not an interstate call, but, instead, a toll call. In fact, "telephone toll service" is defined (in 47 U.S.C. § 153(48)) as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." The reference to "exchange service" clearly shows that the two definitions should be considered together.

The second key point is highlighted by the first: the distinction between which calls are "local" and which are "toll" is not a function of ***location*** but a function of ***economics.*** A "local" call can be either "within a telephone exchange" or "within a connected system of telephone

[24] Although, as shown below, the definition does not use the term "local" service, a related definition simply states that a "local exchange carrier" is a provider of either "telephone exchange service" or "exchange access." *See* 47 U.S.C. § 153(26). As a result, the Commission has found, "telephone exchange service is essentially a local service." In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, FCC 97-36 (released February 7, 1997) at ¶ 84.

exchanges." What matters is that the call be "covered by the exchange service charge."[25] By the same token, the quintessential requirement under 47 U.S.C. § 153(48) for a call to be a "toll" call is that there be "a separate charge ***not*** included in contracts with subscribers for exchange service."[26]

The import of these provisions to the present controversy is obvious. The Commission has been at great pains over the years to ensure that ISPs can obtain service from LECs that allows the ISPs to receive local calls, *i.e.,* calls which are "covered by the exchange service charge[s]" assessed on the end users making them, and for which no "separate charge" is made. This is, at bottom, the entire purpose of the ESP Exemption. It follows that these calls are, as a statutory matter, "local" calls, ***precisely because they are treated as such for economic purposes.*** In other words, the statutory definitions applicable to the distinction between local and long distance calls — which the D.C. Circuit found to be "the heart of this case" — compel a focus on the economics of the situation, which, in turn, compel the conclusion that ISP-bound calls be deemed to be "local."

c. The Question Of Where A "Call" "Terminates."

As noted above, Section 251(b)(5) refers to reciprocal compensation arrangements for "telecommunications." It does not mention "calls" as such at all. That does not mean, however, that the notion of compensation for "calls" has no statutory foundation. To the contrary, Section 252(b)(2), in discussing standards for state commissions to apply in setting reciprocal compensation ***rates,*** makes specific reference to compensation for "calls."[27]

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[25] This discussion does not even address the provisions of 47 U.S.C. § 153(47)(B), which embraces within the definition of "telephone exchange service" anything that is "comparable to" the type of service defined in 47 U.S.C. § 153(47)(A) (which was the original, pre-1996-Act definition).

[26] Note that a call is not a toll call — even if the two "stations" being connected are in different "exchange areas" — if there is no "separate charge" for it.

[27] Section 252(d)(2)(A) sets minimum standards for reciprocal compensation arrangements under Section 251(b)(5). Section 252(d)(2)(A)(i) requires "mutual and reciprocal recovery" of the costs of "***calls*** that originate on the network facilities of the other carrier." Section 252(d)(2)(A)(ii) requires that those costs be determined based on "a reasonable approximation of the additional costs of terminating such ***calls***." Finally, Section 252(d)(2)(B)(ii) limits the authority of the Commission and state commissions "to require carriers to maintain records with respect to the additional costs of such ***calls***."

(footnote continued)...

A direct result of the Commission's confusion about the end-to-end analysis in the *Reciprocal Compensation Ruling* was a conflation of two very different concepts. In the jurisdictional inquiry, what matters is where the "communication" ends. In the reciprocal compensation inquiry, what matters is where the "call" ends. As the D.C. Circuit recognized, these are very different questions. While the court did not take issue with the application of the end-to-end analysis to the total "communication" that occurs between an end user and a distant web site for jurisdictional purposes, for compensation purposes the court was adamant that when an end user calls an ISP, the ISP — not some distant web site — "is ***clearly*** the 'called party.'" 206 F.3d at 6.

There is both statutory and practical support for the view that a call to an ISP actually ends — *i.e.,* "terminates" — with the ISP. Both "telephone exchange service" and "telephone toll service" involve "calls" as conventionally understood. Indeed, the definition of "telephone exchange service" appeals directly to the general understanding of local calling — "intercommunicating service of the character ordinarily furnished by a single exchange."[28] In contrast, the notion of a "wire communication" under 47 U.S.C. § 153(52) is much broader,

(...continued)
In light of this language, it is reasonable — if not mandatory — to determine the scope of LECs' reciprocal compensation obligations from the perspective of "calls" exchanged between them.

[28] Any doubt that "telephone exchange service" refers to telephone calls to lines served with standard telephone numbers is dispelled by Section 271(c)(2)(B)(viii), which requires Bell companies, as part of the "competitive checklist," to provide "white pages directory listings for customers of the other carrier's ***telephone exchange service.***" *See also* Section 222(e) (directing providers of "telephone exchange service" to make lists of their subscribers available for the purpose of publishing directories). Telephone numbers (included in directories) are associated with "telephone exchange service" because that service, at bottom, is the ability to dial a group of telephone numbers without the "separate charge" applicable to telephone toll service, and to establish a circuit-switched path to the loop to which the dialed number is assigned. *See* In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, *Memorandum Opinion and Order,* FCC 86-85, 59 RR 2d 1275 (1986), Appendix B, ¶ 4 (NXX codes and telephone numbers are used "for the efficient operation of the ***public switched network***") (emphasis added). Indeed, "the basic function of the NNX code is to instruct switching machines ***in the local exchange system*** how to route incoming traffic." In the Matter of Referral of Questions from General Communication Incorporated vs. Alascom, Inc. in the United States District Court for the Western District of Washington Request for Declaratory Ruling of General Communication Incorporated Regarding Alascom's Misrepresentation and Misapplication of Its WATS Tariffs, *Memorandum Opinion and Order,* 3 FCC Rcd 700 (1988) at ¶ 58 (emphasis added).

encompassing the "transmission of writing, signs, signals, pictures, and sounds ***of all kinds*** ... between the points of origin and reception of such transmission."

As a result, while all telephone ***calls*** — local or toll, interstate or intrastate — are "communications," not all "communications" are calls.[29] One of the unusual features of dial-up communications to the Internet is that one part of the communication — the link between the end user and the ISP — meets the criteria for being a "call," while other parts — the data processing, data retrieval, and packet-switched data exchange — do not. For purposes of the present case, note that attending to the statutory distinction between a "call" and a "communication" appears to be the only way to harmonize the D.C. Circuit's acceptance of the use of the end-to-end analysis for jurisdictional purposes (where the relevant statute refers to "communications") with its unequivocal (and correct) holding that when an end user calls his or her ISP, the party being called is, indeed, the ISP, and not some remotely located web server that (in all likelihood) is not even connected to the PSTN. In this regard, both elsewhere in Title II of the Communications Act and in common usage, the term "call" refers to a normal circuit-switched connection between two telephone numbers.[30]

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[29] The traditional distinction is between (a) normal telephone calls, *i.e.*, telephone exchange or telephone toll service, and (b) non-switched, dedicated private line connections. *See, e.g.*, In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, *Report and Order*, 60 F.C.C.2d 261 (1976) at ¶ 64 ("[T]o qualify as a private line service, at least one aspect of the service must be a dedicated facility not used or usable for local telephone exchange service.") In this regard, the telecommunications facilities (as opposed to the computers) that make up the Internet itself consist largely of non-switched private lines.

[30] *See, e.g.*, references to "calls," "called telephone numbers," etc. in 47 U.S.C. § 222(d)(3) (discussing telemarketing "calls"); § 223(a)(1) (discussing obscene or harassing "calls," and referring to the "called number"); § 223(b)(1)(A) (discussing obscene or harassing "calls"); § 225(d)(1)(D) (discussing "calls" to Telecommunications Relay Service); § 226, *passim* (repeated discussion of "calls" handled by operator service providers); § 227, *passim*, including, specifically: § 227(a)(1)(A) (referring to "telephone numbers to be called"); § 227(b)(1)(A) (referring to "calls" to "telephone lines" and "telephone numbers"); § 227(b)(2)(C) (same); § 227(c)(3)(G) (same); § 227(d)(3)(B) (referring to the "called party's line"); § 228, *passim* (referring to "pay-per-call" services); § 229 (referring to "call-identifying information" to be made available to law enforcement agencies); § 271(c)(2)(B)(vii)(III) (referring to "operator call completion services" as part of competitive checklist); § 271(c)(2)(B)(x) (referring to access to data bases needed for "call routing and completion"); § 271(j) (treating services where the "called party" can choose the IXC as in-region interLATA services); § 274(i)(7) (defining inbound telemarketing as marketing where the customer initiates "the call"); § 275(d) (referring to (footnote continued)...

For these reasons, the question of where a "call" to an ISP "terminates" for reciprocal compensation purposes has to be assessed separately from the question of where a "communication" begins or ends for jurisdictional purposes. This supports the conclusion that ISP-bound calls in fact "terminate" with the ISP, and — as shown above — as long as ISP-bound calls are rated as local, they should be treated as local for reciprocal compensation purposes.

d. The Question Of "Access Service" And "Exchange Access."

Additional (and unnecessary) confusion on the proper application Section 251(b)(5) to ISP-bound calls has arisen by virtue of the Commission's traditional regulatory definition of "access service" under 47 C.F.R. § 69.2 and the statutory definition of "exchange access" in 47 U.S.C. § 153(16), added to the Communications Act by the Telecommunications Act of 1996. The two definitions are radically different in scope and these differences — considered in light of other definitional changes added in 1996 — show two things. First, to the extent that ISP-bound calls are jurisdictionally interstate, they probably do meet the Commission's traditional regulatory definition of "access service," but clearly do not meet the new statutory definition of "exchange access." Second, even if they do meet the new statutory definition, that does not preclude them from ***also*** meeting the new definition of "telephone exchange service," and certainly does not imply that they cannot nevertheless be treated as subject to reciprocal compensation under Section 251(b)(5).

The Commission's regulatory definition of "access service" is quite broad. In Section 69.2 of its rules, the Commission has determined that "access service" means:

> services and facilities provided for the origination or termination of ***any*** interstate or foreign telecommunication.

47 C.F.R. § 69.2 (emphasis added). While even this question is not totally free from doubt, on the whole it is not difficult to conclude that calls to ISPs fall within the broad sweep of this definition. When an ISP obtains data from a distant web site, even though the ISP itself is not providing a

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(...continued)
"calls received" by alarm service providers); § 276(b)(1)(A) (references to completed "calls" from pay phones).

telecommunications service to its customers, and may not even be obtaining telecommunications ***service*** as such from its upstream provider,[31] it is not too much of a stretch to conclude that ***some*** origination of "telecommunications" is involved. *See* 206 F.3d at 7 (emphasis added) (noting that "the mere fact that the ISP ***originates further telecommunications*** does not imply that the original telecommunication does not 'terminate' at the ISP.")

One consequence of having a broad definition such as that in 47 C.F.R. § 69.2 is that lots of services fall within it, and there may well be good reasons to treat different sub-groups of services differently. This, indeed, is what the Commission has traditionally done. "Access service" is subdivided into special access and switched access, and switched access is further subdivided into Feature Groups A through D, along with special types of "access" like the SLC and the PICC, all of which are subject to different rules, rates and rate structures.

The ESP Exemption exists within this broad regulatory definition of "access service." In establishing the exemption, the Commission concluded, properly, that even though ISP-bound calls might fit the broad general definition, for various reasons it did not make sense to treat their links to the PSTN as (for example) Feature Group A lines, and it did not make sense to treat end-user calls to the ISPs' lines as (for example) calls to long distance carriers.

This definitional analysis, however, cannot reasonably be extended to the new, statutory definition of "exchange access." The new definition of "exchange access" is straightforward, but is much, much narrower than the old regulatory definition of "access service":

> The term "exchange access" means the offering of access to telephone exchange services or facilities ***for the purpose of the origination or termination of telephone toll services.***

47 U.S.C. § 153(16) (emphasis added). The regulatory definition applies to essentially any "service or facility" used to originate or terminate "***any*** interstate or foreign telecommunication." The new

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[31] *See* 47 U.S.C. § 153(46) ("telecommunications service" defined as offering "telecommunications" to the public for a fee).

definition applies only to access to "telephone exchange services or facilities," and only for the purpose of originating or terminating "telephone toll services."

It is hard to see how this narrower definition could reasonably apply to the service that ISPs buy when they obtain their ISDN Primary Rate Interface ("PRI") lines from an ILEC or a CLEC in order to receive local calls. One can argue that the services that ISPs provide involve some type of interstate communication, but it is hard to see how they can be said to provide "telephone toll service." Consider again the definition of that service:

> The term "telephone toll service" means ***telephone service*** between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

47 U.S.C. § 153(48). To Global NAPs' knowledge, no party seriously contends that ISPs provide any type of "telephone service" at all, much less "telephone service between ***stations***" — *i.e.*, telephone sets — "in different exchange areas." As the D.C. Circuit recognized, "[a]lthough ISPs use telecommunications to provide information services, they are not themselves telecommunications providers (as are long distance carriers)" 206 F.3d at 7. *See also id.* at 6 ("in contrast" to normal long distance carriers, "ISPs … are 'information service providers,' … which upon receiving a call originate further communications to deliver and retrieve information to and from distant websites.") ISPs provide information services. This makes them ***consumers*** of telecommunications ("telephone service") provided by carriers. *See id.* at 7 (court accepts conclusion that ISPs are "no different from many businesses, such as 'pizza delivery firms, travel reservations agencies, credit card verification firms, or taxicab companies,' which use a variety of communication services to provide their goods or services to their customers.") In these circumstances, there is no rational basis upon which the Commission could reasonably conclude that by making a call to an ISP, an end user is obtaining "access to telephone exchange services or facilities ***for the purpose of the origination or termination of telephone toll services.***"

With due respect, the Commission's apparently contrary conclusion in an unrelated proceeding in December 1999 is wrong. *See* 206 F.3d at 8-9. In that case the Commission reasoned, basically, that ***ISPs*** use "telephone toll service" in their own upstream connections to the

Internet; that when end users connect to the ISP, they indirectly connect to the telephone toll service (that the ISP ***uses,*** not ***provides***); and that the call to the ISP is, therefore, an instance of "access" to "telephone toll service," and therefore meets the statutory definition. This just doesn't wash. The end user who makes the call is not doing so "for the purpose of the origination or termination of telephone toll services;" the end user is making the call in order to obtain access to the ISP's ***information services.*** Similarly, the ISP that purchases local lines on the PSTN in order to receive calls from its subscribers isn't doing so "for the purpose of the origination or termination of telephone toll services;" the ISP is purchasing its local exchange services precisely in order to allow its customers to reach its information services by means of a ***local*** call, not by means of a ***toll*** call.[32]

Global NAPs obviously is not privy to the Commission's internal analysis that led to the issuance of the order in December 1999; even so, a few observations are in order. First, as the Commission is aware, at the oral argument on the appeal of the *Reciprocal Compensation Ruling,* the panel was concerned about the assertion that calls to ISPs met the statutory definition of "exchange access," pressing the Commission's General Counsel on the point at some length, and

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[32] Evidence already in the record of the rulemaking phase of this proceeding shows that the Commission would actually be on thin factual ice to claim that most, or even more than 10%, of the actual "communications" carried between ILECs and CLECs on their way to ISP actually entail "writing, signs, signals, pictures or sounds" that go across state boundaries. This is because most of the time during a dial-up connection to an ISP, the only signals being exchanged begin and end with the end user's and ISP's modem CPE and do not extend beyond that point, even to the ISP's own servers, much less to the Internet as a whole. *See* Global NAPs Reply Comments, Section 6 (filed April 27, 1999). This suggests that, to the extent the Commission truly wants to retain jurisdiction over ISP-bound calls and connections to the Internet in general, it would be well-advised to re-think whether applying the traditional "end-to-end" test actually makes sense in this context, even for purposes of jurisdiction. The original record before the Commission leading up to the *Reciprocal Compensation Ruling* contained at least one alternative jurisdictional theory, *viz.,* to treat the "Internet" as extending to all ISP equipment, and to declare (based, *inter alia,* on 47 U.S.C. § 230, including Section 230(c)) the entire Internet to be inherently federal and inherently interstate (or international). *See* Comments of Adelphia, *et al.* (filed July 17, 1997) at 5, 18-20; Reply Comments of Adelphia, *et al.* (filed July 31, 1997) at 7-12. To draw an analogy to traditional circuit-switched arrangements, this would be roughly equivalent to treating the entire Internet as an integrated interstate/international private line network. A moment's reflection will reveal that this is probably a much better analogy than anything based on determining jurisdiction by analogy to switched services like local exchange service and traditional switched MTS.

expressing skepticism about it.[33] It is not likely coincidental that a month after that oral argument, the Commission takes pains to find a proceeding in which to stretch the definition of "exchange access" to cover dial-up connections to ISPs.

This leads to the more critical question, which is why the Commission should actually care whether ISP-bound calls fall under that rubric or not. The fact is, ***in light of the actual reasoning in the D.C. Circuit's order,*** the Commission shouldn't care at all. One of the flaws in the reasoning of the *Reciprocal Compensation Ruling* was the assumption that if a call is jurisdictionally interstate, the call cannot also be local. As described above, there is neither a statutory nor an economic basis for any such conclusion; the inquiry under 47 U.S.C. § 153(22) to determine if a communication is "interstate" is simply a different statutory question than the inquiry under 47 U.S.C. § 153(47) to determine if a call is an instance of "telephone exchange service" or the inquiry under 47 U.S.C. § 251(b)(5) to determine if a call results in the payment of access charges to one of the collaborating LECs, thereby making reciprocal compensation inapplicable.

The Commission's Procrustean effort to squeeze dial-up ISP-bound calls into the statutory "exchange access" box represents, in effect, the flip side of the legal error just referenced. The ***regulatory*** definition of "access service" is so broad — basically, any use of any facility or service to connect to any interstate telecommunication — that it is reasonable to conclude that if a local exchange carrier's activity does not meet the ***regulatory*** definition of "access service," the Commission probably does not have jurisdiction over it.[34] Under the ***regulatory*** definition of "access service," therefore, if the Commission wants to retain jurisdiction over connections to the

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[33] This skepticism is, of course, heavily reflected in the court's final decision. The court's repeated emphasis that when an end user calls an ISP, the ISP is the "called party;" its repeated emphasis of the conclusion that the mere fact that some communication occurs beyond the ISP does ***not*** imply that the call does not terminate at the ISP; and its specific discussion of this very question at the end of the opinion all show that the court will not simply accede to a Commission ruling that ISP-bound calls are a form of "exchange access" (*Chevron* deference notwithstanding). Any such conclusion would actually have to make sense in light of the various relevant statutory provisions — and it doesn't.

[34] Of course, the Commission has jurisdiction over interstate telephone toll service, but that service is provided, by definition, by an entity acting as a long distance carrier as opposed to a local exchange carrier.

Internet (which it understandably should, in light of the overriding federal interest in the Internet, *see, e.g.*, 47 U.S.C. §§ 230(a), (b)), it is almost forced to conclude that those connections meet the definition of "access."

The statutory definition of "exchange access," however, is both narrower and broader than the regulatory definition; it is simply a different beast. Under 47 U.S.C. §§ 152 and 153(22), the Commission has jurisdiction over all "interstate communications." This includes any telecommunications services carrying the interstate communications, whether or not the telecommunications services fall into any of the specific categories of "exchange access," "telephone exchange service," or "telephone toll service." Any telecommunications service that meets the Section 153(22) definition of "interstate" is under the Commission's jurisdiction — as a generic "telecommunications service" under 47 U.S.C. § 153(46) (also newly added in 1996), if nothing else — just the same. It simply does not matter to the Commission's jurisdiction whether ISP-bound calls are "exchange access" or not. At the same time, it is obvious that "telephone toll service" can be either interstate (under the Commission's jurisdiction) or intrastate.[35] Since "exchange access" embraces ***all*** uses of telephone exchange service to originate or terminate "telephone toll service," it follows that the ***statutory*** category of "exchange access" includes ***intrastate*** access (associated with intrastate toll calls) that is plainly outside the Commission's jurisdiction.

It appears to Global NAPs that the Commission has been straining to retain the classification of ISP-bound calls as (previously regulatory, now statutory) "access" in a misguided effort to retain jurisdiction over those calls. In fact, as discussed above, a call to an ISP is jurisdictionally interstate to the extent that the communications between the end user's CPE and the ISP's CPE continues on to distant websites, ***even if*** the same call is an instance of "telephone exchange service" under 47 U.S.C. § 153(47) and treated as a "local" (non-access-charged) call for purposes of 47 U.S.C. § 251(b)(5). This is the only possible meaning to ascribe to the court's conclusion that the end-to-end test may properly be applied to determine jurisdiction, even while it

[35] Compare a call from San Francisco to San Diego (intrastate "telephone toll service") and a call from San Francisco to Seattle (interstate "telephone toll service").

made quite clear that it did not understand why that same test is relevant to reciprocal compensation.

One last time: ***The Commission does not need to classify ISP-bound calls as any type of "access" in order to retain jurisdiction over them. Jurisdiction is determined by the end points of the total "communication" under 47 U.S.C. §§ 153(52) and 153(22). It is unaffected by which, if any, particular statutory type of "telecommunications" the calls might fall into.*** Global NAPs challenges any party to this proceeding to identify a single provision in the Communications Act which suggests that the Commission's jurisdiction ***is*** affected by such concerns.

In any event, though, it actually does not matter very much even if the Commission were to conclude that ISP-bound calls ***do*** fit the statutory definition of "exchange access." Nothing in that definition suggests that all calls which fit the definition are for some reason automatically excluded from the reciprocal compensation provisions of Section 251(b)(5). To the contrary. Just as the Commission previously acted under its general Section 201 authority to establish the ESP Exemption from (regulatory) access charge arrangements, so too may the Commission exercise its plenary authority over the operation of Section 251(b)(5) to declare that the exemption continues — and that "local" compensation arrangements apply — even if this traffic does, somehow, fit the definition of ***statutory*** access.[36]

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36 In fact, upon reflection, it, nothing in the Act actually supports the conclusion (which was assumed by the parties during the D.C. Circuit litigation) that a call that meets the definition of "exchange access" cannot also, simultaneously, meet the definition of "telephone exchange service." For example, an end user call to a Feature Group A line would appear to meet both definitions, as would an end user call to a locally-situated and locally-dialable conference bridge into which another, distant caller has also called. In fact, as suggested above, it is evident that the new statutory definitions added by the 1996 Act do not neatly divide the world of "telecommunications services" (one of the new definitions) into discrete and comprehensive categories of "exchange access," "telephone toll service," and "telephone exchange service." Private data lines connecting computer facilities, for example, may be local or interexchange, and may be interstate or intrastate, but they do not appear to fit into any specific statutory category narrower than the (inclusive, for Title II purposes) rubric of "telecommunications service." The Commission may at some point want to initiate a rulemaking or notice of inquiry to develop regulatory classifications of telecommunications services that reflect the changed statutory landscape; but all that is needed now is recognition that whatever else the statutory definitions may be, they are not neat, tidy, or mutually exclusive.

e. The Question of "Information Access" And Section 251(g).

Section 251(g), broadly speaking, states that the requirements for exchange access and information access applicable to ILECs as of the date of enactment of the 1996 Act remain in effect until affirmatively changed by the Commission. The term "information access" is not defined in the Act, but is plainly a reference to the use of that term in the Modification of Final Judgment ("MFJ") that broke up the Bell System in 1984. Under the MFJ, "information access" referred to the terms and conditions under which information service providers obtained access to the Bell Operating Companies' ("BOCs'") local exchange networks.

The MFJ took effect at the same time that the ESP Exemption from access charges took effect, *i.e.,* January 1, 1984. Indeed, the entire access charge regime was created to accommodate the divestiture of the BOCs from AT&T. Consequently, for purposes of Section 251(g), it makes sense to read the MFJ and the ESP Exemption *in pari materia* in determining what ILECs obligations Section 251(g) should be read to preserve. In fact, the combined effect of the MFJ and the ESP Exemption was to establish that during the entire time from 1984 through 1996 — basically, the entire period of the initial growth and development of the consumer Internet — "information access" meant that ISPs could purchase local exchange service to receive local calls, and end users could use their own local exchange service to call ISPs.

From this perspective, the system that was in place as of February 1996 was a system in which — pursuant to the ESP Exemption — the traffic that ISPs received from their end user subscribers was "local" traffic. This is clear from the Commission's discussion of this question in the May 1997 *Access Charge Reform Order*. As noted by the D.C. Circuit, in that order the Commission "referred to calls to information service providers as 'local.'" *Bell Atlantic v. FCC,* 206 F.3d at 8. This same terminology was urged upon, and adopted by, the 8th Circuit in its review of that Commission action. *See Southwestern Bell v. FCC,* 153 F.3d 523 (8th Cir. 1998), *cited at* 206 F.3d 8.

It follows that, until and unless the Commission expressly rules to the contrary, Section 251(g) ***requires*** that Section 251(b)(5) be interpreted and applied consistent with the pre-existing practice of treating ISP-bound calls as "local," since that is how such calls were treated both as a matter of traditional "access charges" and as a matter of BOC "information access" obligations under the MFJ. Section 251(g), therefore, provides a statutory basis for directly importing the "local" nature of ISP-bound calling into Section 251, including Section 251(b)(5).

4. The Right Answer On The Merits.

The discussion above shows that the Commission may, and should, declare that ISP-bound calls are subject to the reciprocal compensation obligation imposed by 47 U.S.C. § 251(b)(5). Global NAPs anticipates that various parties will urge the Commission to establish detailed rules of various sorts to implement that conclusion. CLECs will no doubt argue that ISP-bound calls should be treated exactly like all other local calls; ILECs will no doubt advance various clever schemes to hedge their bets — "don't hold that there must be compensation for these calls, but, if you do, adopt the following rule that will (coincidentally, of course) radically reduce our exposure on this front."

Global NAPs, of course, sides with the CLECs — it is one. But the fact is that the Commission does not need to, and probably should not, get too involved in the details at this point. The controversy on this topic has arisen largely because ILECs have had claims — ultimately wrong, but not utterly, totally insane — that they didn't have to pay reciprocal compensation for these calls ***at all.*** Once that issue is behind us, the normal duty to negotiate in good faith to meet the parties' (by hypothesis, clarified) duty under Section 251(b)(5) should be allowed to run its course. Indeed, in the rulemaking portion of the *Reciprocal Compensation Ruling,* the Commission expressed its preference for a regime that encourages negotiated solutions even if intercarrier compensation for ISP-bound calling did ***not*** fit under Section 251(b)(5).

The only clarification the Commission should issue on this score is that it is not permissible to establish a separate reciprocal compensation rate that applies either to ISP-bound traffic as a distinct class, or to situations where one carrier receives, rather than originates, most or all of the traffic exchanged between carriers. This clarification protects ISPs, and CLECs who serve them, from blatant discrimination. ISPs are entitled to use local exchange service from their chosen LECs to receive local calls. Nothing in the Communications Act or any policy of this Commission obliges CLECs to serve any particular mix of call-receiving and call-originating customers, and certainly nothing obliges ISPs individually or as a class to start originating calls as a condition to having competitive options for local exchange service.

Global NAPs recognizes that there are responsible arguments suggesting that a simple per-minute compensation mechanism may not be the most appropriate way to handle reciprocal compensation in the long run. Without endorsing the specific result reached, for example, Global NAPs notes that the New York PSC conducted a proceeding on this topic that resulted in a general rule resulting in lower ongoing compensation for ***any*** CLEC that primarily serves customers who receive "convergent" traffic, *i.e.,* high-volume traffic delivered within a relatively narrow geographic location. Others have suggested compensation based on a call set-up charge and a subsequent minute charge. The Commission itself has suggested the possibility of capacity-based charges, as opposed to per-minute charges.

All of these ideas are within the realm of reasonable debate and consideration. But the first step in moving meaningful negotiations forward has yet to be taken, which is a clear declaration by this Commission that the ILECs, indeed, have to negotiate. ***That*** is what would be accomplished by a ruling that ISP-bound calls are subject to Section 251(b)(5), and ***that*** is the ruling the Commission should issue in this case, in light of the remand from the D.C. Circuit.

5. Conclusion.

The D.C. Circuit's decision to vacate the *Reciprocal Compensation Ruling* provides the Commission with its first chance in three years to issue an interpretation of Section 251(b)(5) and 47 C.F.R. § 51.701 in the context of ISP-bound calls that is not constrained by doubts about the Commission's authority to determine how state regulators must apply that provision. Those doubts — created by the 8th Circuit's erroneous view of the scope of the Commission's authority in the *Iowa Utilities Board* case — infected and distorted the Commission's analysis in the *Reciprocal Compensation Ruling*, leading to the "intuitively backwards" result that the court vacated.

Freed to take a fresh look at the issue, the correct approach is clear. ISP-bound calls may or may not be wholly or partially interstate, but that really doesn't matter. What matters is that when end users call ISPs, they do so by using the telephone exchange services they buy from their serving

LECs; and when ISPs receive calls from end users, they do so by using the telephone exchange services ***they*** buy from ***their*** serving LECs. These calls are local calls from both a technical and economic perspective. The LEC serving the ISP does not receive access charges, and cannot do so under the ESP Exemption. All this means that, in the D.C. Circuit's words, treating ISP-bound calls as local "works for purposes of reciprocal compensation." 206 F.3d at 7.

For the reasons discussed above, Global NAPs does not believe that ISP-bound calls actually meet the definition of "exchange access" in 47 U.S.C. § 153(16). But just as the correct result — ISP-bound calls subject to Section 251(b)(5) — is unaffected by whether ISP-bound calls meet the statutory standard for "interstate communications" under 47 U.S.C. § 153(20), this result is also unaffected by whether ISP-bound calls meet the statutory definition of "exchange access." The Commission was free then to rule that ESPs were exempt from access charges even though they may have been purchasing "access service" as defined in the Commission's rules. The Commission is free now to rule that ISPs remain exempt from access charges — and that ISP-bound calls are subject to compensation under 47 U.S.C. § 251(b)(5) — even if it concludes, on some basis, that the service ISPs obtain from CLECs meets the definition of "exchange access."

For all these reasons, the Commission should promptly rule that ISP-bound calls are, indeed, "local" calls for purposes of Section 251(b)(5). This would end more than three years of contention and litigation between ILECs and CLECs about the basic "ground rules" of competing for the business of ISPs, and allow them to move on to the more challenging — but ultimately more productive — task of negotiating and arbitrating the details of what compensation arrangements should be applied.

Respectfully submitted,

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July 21, 2000

CERTIFICATE OF SERVICE

I, Linda M. Blair, a secretary with the law firm of Cole, Raywid & Braverman, L.L.P., do hereby certify that I have this 21st day of July 2000, caused the foregoing Comments of Global NAPs, Inc., in the CC Docket Nos. 96-98, 99-68 proceeding, to be served by hand delivery, upon the following:

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